Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	
In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
Cable Home Wiring	)	

FURTHER JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE

Introduction

The Joint Commenters, representing the owners and managers of multi-unit properties,[1] submit these Further Comments in response to the Commission's Second Further

[1] The "Joint Commenters" are the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Multi-Housing Council, and the National Realty Committee. The Joint Commenters have filed comments in Docket No. 92-260 dated March 18, 1996 (the "Home Wiring Comments"), and reply comments dated April 17, 1996 (the "Home Wiring Reply Comments"). In Docket No. 95-184, the Joint Commenters filed

Notice of Proposed Rulemaking released October 17, 1997 (the "Second Further Notice"). We urge the Commission not to act in this area because Commission regulation is more likely to interfere with than advance the Commission's goals.

I. THE COMMISSION SHOULD APPROACH LIMITING EXCLUSIVE CONTRACTS TO PROVIDE VIDEO SERVICES WITH EXTREME CAUTION.

The Second Further Notice recognizes that exclusive contracts can, depending on the circumstances, either enhance or inhibit competition. *Id.* at ¶258. We agree with this conclusion. The Commission faces two difficulties, however. First, it is a complex and uncertain task to determine what the outcome will be in a given circumstance. Second, the Commission's legal authority does not permit it to take all the steps it may find necessary to reach the desired outcome. Therefore, we urge the Commission to tread carefully.

A. Exclusive Contracts Are Often the Only Economically Viable Means of Delivering Video Services to Consumers.

We support the Commission's goal of providing consumers with competitive sources of video programming. So the question becomes "What is the best way to foster a competitive marketplace?" The answer depends on the characteristics of a particular market.

For example, video programming providers, especially new entrants in a given market area, typically require a minimum return on the capital investment required to bring programming into a building or geographic area and distribute it to potential subscribers. If a particular project cannot produce such a return, a provider may decide not to invest in the building or the market because it will not be profitable, and could even result in a loss.

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comments on March 18, 1996 (the "Inside Wiring Comments") and reply comments on April 17, 1996 (the "Inside Wiring Reply Comments"). Finally, the Joint Commenters filed Further Joint Comments (the "First Further Comments") and Reply Comments (the "First Further Reply Comments") in both dockets on September 25, 1997, and October 6, 1997, respectively.

Generally speaking, the larger a building is, the more potential subscribers it has, and the lower the facilities installation cost is per subscriber. Therefore, the larger the building, the larger the programming provider's profit margin. Conversely, while smaller buildings may be cheaper to wire in absolute terms, the programming provider typically must earn a larger share of revenue from each subscriber to recoup its investment in the building, or be assured that a relatively large proportion of building residents will subscribe to the provider's service.

It is in these cases that exclusive contracts become particularly important. If a building owner were to allow more than one provider to serve such a building, the number of subscribers available to each programming provider would be reduced, since presumably not all would buy service from the same provider. Thus, the presence of multiple providers immediately reduces each provider's potential revenue; if revenues are reduced enough, one or even both providers could find serving the building unprofitable. Therefore, exclusive contracts often not only promote competition, but more importantly promote delivery of service. Without exclusive contracts, many buildings might not have any kind of video programming service.[2]

For example, Jim Arbury, Vice President of the National Multi Housing Council, recently asked representatives of three satellite service providers whether they would be willing to install their facilities in a medium quality building in a smaller metropolitan area such as Louisville or

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[2] Building owners want video programming available in their buildings because their residents want the service. Whether the service is provided by a cable operator or some other kind of company is largely irrelevant. Thus, we are concerned not with the outcome of the battle among DBS, cable and SMATV operators, but with the possibility that Commission regulation may make it difficult and expensive to serve some segment of the apartment market. Current market conditions may not be perfect, but we are skeptical of the Commission's ability to do better. Therefore, for example, although we agree that market power was a factor in many cases in which building owners have agreed to exclusive contracts with cable operators, we do not believe this to be sufficient reason to interfere with exclusive contracts now. The key consideration is whether, absent exclusivity, any operator would be willing to take the risk of wiring a particular building.

Indianapolis, assuming the building had 60 units and the national annual tenant turnover rate of 30%, and the local franchised cable operator was already serving the building. All three said they would not be interested. *See* attached Declaration of Jim Arbury. Without the right to enter into exclusive contracts, many building owners would be forced to deal with the incumbent cable operator and nobody else. This would not promote competition.

Although the Commission seems to acknowledge this point by its willingness to allow exclusive contracts, we think it important to emphasize that it is the economics of the video programming providers' business that dictate the need for exclusive contracts. The principal force behind exclusive contracts has always been and continues to be the service providers, not the building owners.[3]

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[3] Some will argue that building owners "demand" fees from providers and thus are a driving force behind exclusive contracts. This is not true. Apartment owners and managers are overwhelmingly concerned with providing their residents with high quality, up-to-date, reasonably priced service. In most buildings, even a small drop in occupancy rates resulting from failure to provide residents with adequate video programming service would far exceed the revenues a building owner might receive from a service provider in return for an exclusive contract.

In addition, merely because some providers are willing to pay fees for the right to serve some buildings does not mean such practices are prevalent. Providers typically only offer to pay building owners in the case of new, up-scale properties that are located in metropolitan areas where there is active competition and that promise high profitability. Such payments or revenue sharing agreements are generally for modest amounts and the result of competition among providers, not requirements of building owners. This is not to say that building owners are not mindful of the possibility of additional revenue -- only that it is the providers' willingness to pay that drives the market. Furthermore, anecdotal evidence of the kind offered in the past by various providers is hardly reliable when one considers the vast size of the apartment market in this country.

The Commission should bear in mind that the vast majority of properties are not the subject of access payments. The different sections of the video programming industry are fighting for shares of the up-scale market, where providers can charge subscribers enough that paying a relatively small amount in access fees is justifiable. Furthermore, most of the new technologies and new services the industry is touting are aimed at up-scale buildings. There is nothing inherently wrong with this, but the Commission should not think that low and middle income Americans are the primary target of video service providers.

B. The Commission Should Not Void Existing Exclusive Contracts.

The Second Further Notice asks whether the Commission should limit the terms of exclusive contracts, including existing contracts. Even though building owners might benefit from the right to escape unfavorable agreements, we do not believe it is appropriate for us to support any Commission interference in freely-negotiated arms'-length contracts, for a number of reasons.

First, as the number of competitive video programming providers grows, more options will become available to building owners. Building owners will respond to these options by attempting to provide their residents with corresponding choices, so long as they are economically feasible. Therefore, the Commission's goals will be met by the market as current contracts expire.

The Commission should also consider the wide variety of circumstances any regulation would have to address. The economics of serving high-rise apartment buildings in large central cities are very different from those of serving smaller buildings just a few blocks away, or those of suburban or rural garden apartments. The value of a building to a service provider depends on the income of residents in the building and the surrounding area, the turnover rate for the building, the number of units in the building, and other factors. A general rule could not address all of these considerations, and any attempt to do so would surely have significant unintended consequences.

Finally, any attempt by the Commission to restrict the terms of existing exclusive contracts over the objections of building owners might raise difficult legal questions. As we have discussed elsewhere, the Commission lacks statutory authority over building owners.[4] The

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[4] *See, e.g.,* Inside Wire Comments at 4-5; Home Wiring Comments at 2-3.

Commission's authority is limited to providers of regulated services. *See GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973). Furthermore, the Commission itself has acknowledged that its jurisdiction does not extend so far as to include buildings or building owners, as such. *Illinois Citizens Committee for Broadcasting v. Sears, Roebuck & Co.*, 35 FCC 2d 237, *aff'd sub nom. Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972). Finally, in *Regents v. Carroll*, 338 U.S. 586 (1950), the Supreme Court held that the Commission has no jurisdiction over contractual rights involving private property. Therefore, the Commission cannot alter the contractual rights of building owners without their consent.

The Commission could perhaps abrogate existing contracts between building owners and programming providers by barring the providers – who are under Commission jurisdiction – from enforcing their current agreements. But such an action would threaten the Constitutional property rights of service providers without Congressional authorization. Any Commission regulation under such circumstances would be invalid. *See Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

C. The Commission May Be Able To Prohibit Providers from Entering Into Exclusive Contracts on a Going-Forward Basis.

The Commission has more authority over prospective exclusive contracts than it does over existing contracts. In *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972), the Supreme Court stated that cable operators (and, by extension, other video programming providers) have "by virtue of their carriage of broadcast signals, necessarily subjected themselves to the Commission's jurisdiction." Furthermore, in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178-179 (1968), the Supreme Court held that the Commission had the authority to prohibit the carriage of certain video signals over a cable system. Therefore, it appears that the Commission

could ban prospective exclusive contracts by exercising its authority over the carriage of video signals.

The Joint Commenters would not object to a reasonable limit on future contracts, provided that Commission regulation would not have the effect of prohibiting service in buildings that would benefit from exclusivity. We urge the Commission to consider any action carefully, because a seemingly small error in this regard could seriously harm some building owners and their residents by depriving them of service and competitive choices. We are not in a position to judge how much time a programming provider needs to recover its capital investment in a given building, but we do wish to point out that the required time period could vary significantly from building to building and region to region. Therefore, it is unlikely that a general rule would achieve the desired result; in fact, such a rule would probably have unintended consequences that would actually hinder the Commission's goals and harm building owners and their tenants.

II. A "FRESH LOOK" AT PERPETUAL OR EXTREMELY LONG-TERM CONTRACTS WOULD BENEFIT BUILDING OWNERS, BUT THE JOINT COMMENTERS DO NOT SUPPORT THE ABROGATION OF EXISTING CONTRACTS.

The Second Further Notice asks whether the Commission should adopt a "fresh look" for perpetual exclusive contracts. A "fresh look" option would probably benefit many building owners and their tenants, by allowing them to escape old, unfavorable contracts that do not reflect current competitive conditions. The Joint Commenters do not support such an approach, however. Building owners generally would prefer to allow the market to take its course than for the Commission to intrude. The question is not whether the market will ensure the desired result in all cases, but whether Commission regulation will ensure the desired result more often than the market will. On balance, despite the benefits "fresh look" or prohibitions on future perpetual

contracts may offer many building owners, the Joint Commenters do not believe it is appropriate for them to challenge existing contracts.

III. ANY PROVISION FOR SHARED USE OF WIRING MUST RESPECT THE RIGHTS OF BUILDING OWNERS AND PRESERVE THE VIABILITY OF EXCLUSIVE CONTRACTS.

The Joint Commenters are primarily concerned with preserving the rights of building owners to control access to and the use of their property. Building owners might not object to shared use, so long as any such Commission regulation did not interfere with private property rights or the ability of residents in less profitable buildings to obtain video programming services. For example, the Commission does not have the authority to direct building owners to make their property available without their consent. *See Bell Atlantic v. FCC,* 24 F.3d 1441 (D.C. Cir. 1994); *Loretto v. TelePrompter Manhattan CATV Corp.,* 458 U.S. 419 (1982). Therefore, the Commission cannot order a building owner to allow any provider to enter or occupy the building owner's premises, or make any connection to the building owner's facilities. Any shared use proposal must provide that building owners will remain free to enter into agreements granting physical access to their buildings only to those providers whom they designate.

Any provision for shared use of wiring must also preserve the right to enter into exclusive contracts, where appropriate. As discussed above, exclusivity is often vital to ensure service to a building, and without exclusive rights some providers might refuse to serve buildings, possibly leaving building owners and residents without video programming service.[5] The Commission must ensure that any provision allowing shared use of wiring respects exclusive contracts.

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[5] Exclusivity can also foster increased competition over time, because it allows newcomers to a market to establish themselves and build market share without competing directly against the incumbent monopolist.

Otherwise, new entrants would be free to demand the right to serve a building using another provider's facilities, thereby disrupting the viability of service in the building by taking market share away from the incumbent. That market share is often the difference between profitability and failure in a building.

Therefore, if a building owner has entered into an exclusive contract, sharing of wiring or other facilities should not be mandated. Only if all the parties consent should sharing be permissible.

Conclusion

The Joint Commenters believe the Commission should be extremely cautious in considering whether to interfere in such a complex marketplace. If it must act, the Commission should respect contractual rights and recognize that exclusive contracts play an important role in extending service to many consumers.

Respectfully submitted,

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December 23, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
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Cable Home Wiring	)	

DECLARATION OF JIM ARBURY
IN SUPPORT OF FURTHER JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE

I, Jim Arbury, declare as follows:

1. I submit this Declaration in support of the Further Joint Comments of the Building Owners and Managers Association, International; the Institute of Real Estate Management; the International Council of Shopping Centers; the National Apartment Association; the National Multi Housing Council and the National Realty Committee. I

am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. I am the Vice President of the National Apartment Association and the National Multi Housing Council Joint Legislative Committee, and have served in that capacity since January 7, 1993. My duties include the monitoring of legislative and regulatory matters in the field of telecommunications that may affect the interests of the members of either association.

3. On December 4, 1997, I attended a telecommunications conference in Dallas, Texas, sponsored by the Community Associations Institute, among others. One of the panels of speakers at the conference consisted of representatives of at least three providers of direct satellite broadcast service. During the session, I asked the panel the following question:

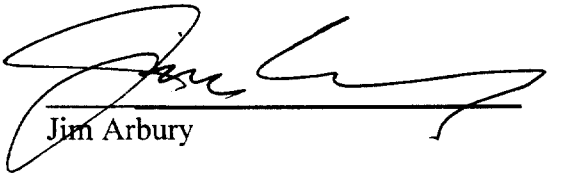
> "Let's suppose that I am an owner of an existing apartment property that has 60 rental units. The property is not top of the line, rather it is a B minus property with respect to overall quality and income level of residents. I am not located in one of the twenty major market areas that many of you are trying to penetrate. My average turnover of residents rate is 33 percent (the national average) and I presently have cable service in the building. Given these facts, are any of you interested in coming into my building and offering competing service to my residents? Are any of you interested in placing a community type of dish or antenna on my roof and feeding cables to residents who want your service?"

4. I did not receive a single positive response. Some panelists pointed out to me the gross impracticality of any kind of head-end investment or investment in other sophisticated equipment because of the factors I laid out.

5. I responded by pointing out that by refusing to serve buildings with the characteristics I cited, the providers had effectively eliminated more than half of the MDU market. The panelists did not respond to this observation.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on December 22, 1997, at Washington, D.C.



Jim Arbury

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